IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

Supreme Court, U. S.
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No. 75-748

FRANK IREY, JR., INC.,

Petitioner,

vs.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.,

Respondents.

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

vs.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

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INTEREST OF THE AMICUS*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to the Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant employment-related matters before the Court. *E.g.*, *Connell Constr. Co.* v. *Plumbers, Local 100*, 421 U. S. 616 (1975); *William E. Arnold Co.* v. *Carpenters*, 417 U. S. 12 (1974); *Super Tire Engin. Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Boys Markets* v. *Retail Clerks*, 398 U. S. 235 (1970); *Porter Co.* v. *NLRB*, 397 U. S. 99 (1970).

The issue presented in these cases, whether the seventh amendment of the United States Constitution compels that employers be accorded the right to a jury trial in civil penalty proceedings under the Occupational Safety and Health Act of 1970 (OSHA), 29 U. S. C. §§ 651 *et seq.*, is a question of vital concern to the Chamber's members. Unlike more common statutory schemes where civil penalty actions for violations of an agency's regulations are brought in federal district court and the right to jury trial is guaranteed, the novel procedures for the enforcement of OSHA subject employers to substantial civil penalties before an administrative tribunal, without benefit

* Pursuant to Rule 42(2) of the Rules of this Court, the *amicus* has obtained written consents to the filing of this brief from the Petitioners and the Solicitor General on behalf of the Respondents. These consents have been filed with the Clerk of the Court.

of the right to *de novo* jury trial at any stage of the proceeding. Further, as will be discussed hereinafter, OSHA contains procedures which permit the Secretary of Labor, in his unfettered discretion, to effectively foreclose even administrative consideration of the merits of an OSHA citation, thus, totally abrogating any semblance of an employer's right to due process of law. Since the majority of the Chamber's members are small businessmen and not large employers with vast resources to contest a citation in the face of the coercive OSHA enforcement procedures, they are in large measure effectively precluded from challenging OSHA citations. The Chamber believes that the OSHA civil penalty procedures improperly deny its members and all employers the fundamental right to jury trial guaranteed by the seventh amendment.

Moreover, since the novel civil penalty procedure contained in OSHA has been suggested as a blueprint for the revision of present legislation as well as a model for the future, the Chamber is particularly concerned that a denial of the fundamental right to a jury trial at issue under the Act here under consideration may well lead to a proliferation of similarly designed enactments to the detriment of the purpose and content of the Seventh Amendment. Because of the broad membership interests represented by the Chamber, it is in a position to bring considerations concerning this important issue to the Court's attention, which might not otherwise be advanced by the particular parties to this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT.

The issue presented in these cases is whether the OSHA civil penalty procedure impermissibly deprives employers the right to jury trial guaranteed by the seventh amendment. This issue, however, is broader than OSHA itself and has far reaching significance since the OSHA procedure has been suggested as a blueprint for the revision of present as well as future Congressional legislation.[1] Thus the issue surrounding the novel enforcement procedure of the Act[2] raises a fundamental question for the future of our Constitutional form of government: To what extent, if at all, may Congress create statutory proceedings to adjudicate rights and deny a jury where, had that action existed at common law, a jury trial would have been guaranteed.

Under the OSHA civil penalty procedure involved here, an employer may be cited for a violation of the agency's regulations,[3] be penalized for such violation, and under threat of accumulating daily penalties, be required to abate or correct the alleged violation within a specified period of time set forth in the citation.[4] An employer then has fifteen (15) days within

1. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 900-901 (1972).

2. *Lance Roofing Company, Inc., et al.* v. *Hodgson*, 343 F. Supp. 685 (N. D. Ga. 1972), *aff'd.*, 409 U. S. 1070 (1972); Opinion of the Fifth Circuit below in No. 75-748, App. to Petition for Writ of Certiorari at 6a. As pointed out in the Petition for Writ of Certiorari at 9, of some 90 civil penalty provisions contained in the U. S. Code, only five (5), including OSHA, assigned to the agency the authority to impose a fine without *de novo* review in the courts.

3. OSHA § 9, 29 U. S. C. § 658.

4. OSHA § 10(a), 29 U. S. C. § 659(a). Section 17, 29 U. S. C. § 666 provides for a penalty of up to $10,000 for a willful violation,

(Continued on next page)

which to contest the citation. The Act provides that an employer wishing to contest a citation or penalty will be afforded an administrative hearing before a hearing examiner of the Occupational Safety and Health Review Commission (OSAHRC).[5] The three-member Commission has discretionary review power to consider appeals from decisions of the hearing examiner.[6] A decision by the Commission, or by the hearing examiner, if the Commission denies or fails to act on a petition for review, may be appealed to the appropriate federal circuit court of appeals or the Court of Appeals for the District of Columbia, where the Commission's or hearing examiner's findings of fact are conclusive and reviewable only under the substantial evidence standard.[7] The penalties assessed under this procedure are payable to the treasury of the United States.[8] At no point in this civil penalty procedure is an employer accorded a *de novo* factual review by a jury on the merits of the citation or penalty.[9]

Moreover, even the foregoing administrative proceeding is illusory. Under the Act the Secretary of Labor or his designee

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§ 17(a); a mandatory penalty of up to $1,000 for a "serious" violation, § 17(b); a penalty of up to $1,000 for a "nonserious" violation, § 17(c); and a penalty of up to $1,000 a day for every day of non-abatement after the abatement period specified in the citation has run, § 17(d).

5. OSHA § 10(c), 29 U. S. C. § 659(c).

6. Unless a member of the Commission decides to grant review, the order of the hearing examiner becomes final 30 days after issuance, with the silence of the Commission constituting a denial of the petition for review. 29 CFR § 2200.91(d) (1974).

7. OSHA § 11(a), 29 U. S. C. § 660(a).

8. OSHA § 17(1), 29 U. S. C. § 666(l).

9. While civil penalties adjudged to be due after the appeal process has terminated may be recovered by the Secretary of Labor in district court, no review of the merits is permitted. OSHA § 10(a), *supra*, provides that citations and proposed penalties are self-executing if not contested within fifteen (15) days and are not reviewable by any court or agency. See, *United States* v. *J. M. Rosa Construction Co.*, 1 OSHA 1188 (D. Conn. 1973).

in the field has the unfettered authority to coerce an employer to forego even the administrative and limited judicial review available to him. Thus, while the Act provides for an automatic stay of the abatement period pending the final order of the Commission, the abatement period is considered as having begun when the citation was issued if the Secretary or his designee decides that the employer is contesting only the amount of the penalty,[10] or is seeking review without good faith or solely for delay or avoidance of penalties.[11] By denying a stay, and bringing to bear the daily non-abatement penalties, the Secretary or his designee can transform a $1,000 penalty into a $100,000 penalty, should an employer choose to contest a citation through the OSHA procedure.[12] The threat of such penalties may force an employer to forego any appellate opportunities and proceed to immediately abate the alleged violation. Where abatement costs are significant, and an employer might wish to contest the citation, practical realities may inhibit his doing so. Faced with the "chilling factor" of continuing daily penalties, the employer would be coerced into incurring abatement costs, appeal would be futile, and, thus, administrative review of the merits of the citation foreclosed.[13]

The *amicus* contends and will demonstrate that the foregoing procedure impermissibly denies employers the right to jury trial guaranteed in the seventh amendment. Under traditional seventh amendment analysis, whether or not the right to jury trial

10. COMPLIANCE OPERATIONS MANUAL pt. XI-6, (Jan. 1972), Office of Compliance, Occupational Safety and Health Administration, Department of Labor.

11. OSHA § 10(b), 29 U. S. C. § 660(b).

12. See *Lance Roofing Company* v. *Hodgson, supra,* where the court observed the average time to obtain a decision from the Commission is 198 days.

13. See Note, *Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures,* 84 Yale L. J. 1380, 1381-1388 (1975) wherein, apart from any seventh amendment consideration, it is suggested that such coerced abatement in and of itself denies an employer due process of law.

extends to statutory actions depends upon whether the statute creates rights and remedies which historically would have been considered actions at law rather than in equity or admiralty. In applying this test, this Court has sought to find an historical analog to the statutory action in question. Here, OSHA creates a right in the United States Government to command adherence to the Act through the enforcement of civil penalties. Under traditional seventh amendment analysis, such actions were considered to be common law actions of debt, carrying with them the right to jury trial.

The fact that Congress has committed the enforcement of OSHA to an administrative proceeding rather than to trial in the district courts, does not alter this conclusion. Where legal as opposed to equitable rights are concerned, Congress can not nullify the right to a jury trial in a proceeding before a court created under Article III of the Constitution, nor can it erode that right simply by substituting an administrative proceeding for a court proceeding. Further, since occupational health and safety is not a concern expressly delegated to Congress by the Constitution nor an area over which Congress has exclusive control, the traditional deference accorded Congressional determinations to administratively enforce its will in such areas is lacking here.

It is the *amicus'* view that since, under traditional analysis, employers have a seventh amendment right to a jury trial when charged with a violation of OSHA, the Court need not weigh that right against any asserted policy considerations which in this context would nullify the right under the seventh amendment. In this respect, the *amicus* agrees with Judge Gibbons who, in his dissent below, was of the view that the preservation of constitutional government outweighs any policy considerations which favor rejection of the right to a jury trial under OSHA. Nonetheless, the *amicus* believes that even if the Court were to apply a less traditional mode of seventh amendment

analysis and balance the seventh amendment right against the asserted reasons for finding the right to a jury trial inappropriate under OSHA, that balance here must be struck in favor of permitting the right to *de novo* jury review upon completion of the administrative procedure.

I.

TRADITIONAL SEVENTH AMENDMENT ANALYSIS COMMANDS THAT THE RIGHT TO TRIAL BY JURY BE AFFORDED EMPLOYERS IN CIVIL PENALTY PROCEEDINGS UNDER OSHA.

A. The Right to Jury Trial Extends to Statutes Which Create Rights and Remedies of the Sort Traditionally Enforced in Actions at Law.

The roots of the seventh amendment are deeply embedded in Constitutional history. Indeed, the amendment was proposed on the day following the enactment of the First Judiciary Act of 1789 which had preserved the right to jury trial as at common law for fear that, although that Act was presently satisfactory, Congress in the future could modify the right or take it away.[14] Thus, while the seventh amendment on its face applies only to "suits at common law,"[15] this Court has preserved that guarantee, repeatedly holding that the right to jury trial extends to statutes which, although not in existence in 1791, create rights and remedies that historically would have been treated as legal rather than equitable.[16] In applying this test, the Court

14. See, *Galloway* v. *United States*, 319 U. S. 372, 297-398 (1943) (Justice Black's dissenting opinion); 5 J. Moore, FEDERAL PRACTICE, ¶ 38.08[5], at 68-73 (2 ed. 1976).

15. U. S. Const. amend. VII provides: "In suits at common law . . . the right of jury trial shall be preserved. . . ."

16. *E.g. Parsons* v. *Bedford*, 28 U. S. (3 Pet.) 433 (1830); *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27 (1916); *Curtis* v. *Loether*, 415 U. S. 189 (1974); *Pernell* v. *Southall Realty*, 416 U. S. 363 (1974).

has sought to find an historical analog which involved rights and remedies like those created by the statute at issue.[17] Thus, consistent with traditional seventh amendment analysis, the question to be resolved here is whether, historically, an action to adjudicate the rights and remedies like those created by OSHA would have been deemed "legal". As will be demonstrated, courts have historically considered similar proceedings to be "suits at common law" carrying with them the right to jury trial.

B. OSHA Creates A Statutory Right in the Government to Recover a Civil Penalty, An Action Which at Common Law Required Trial by Jury.

Under OSHA, Congress has granted the executive branch of the Government the right to enforce occupational safety and ealth regulations by levying civil penalties against those who violate those regulations. This Court long ago recognized that actions for statutory penalties embraced the common law form of action of debt which carried with it the right to a jury trial.[18] Indeed, it has been observed that proceedings to recover statutory penalties were considered common law actions of debt in England prior to the enactment of the Constitution and were considered to be "legal" actions during the early days of the republic. Thus, in *United States* v. *Jepson et al.*, 90 F. Supp. 983 (D. N. J. 1950) the Government brought an action under that section of the Emergency Price Control Act of 1942[19] which provided for the Government's recovery of a penalty in treble the amount of an overcharge in violation of that Act. The Government contended that the action was of statutory origin and an emergency right created by Congress and that, accordingly, the seventh amendment did not apply. The court

17. See *e.g., Pernell* v. *Southall Realty, supra.*

18. *Hepner* v. *United States*, 213 U. S. 103 (1908); *United States* v. *Regan*, 232 U. S. 40 (1914).

19. 56 Stat. 23, 50 U. S. C. App. § 901 *et seq.*

engaged in the traditional seventh amendment and concluded thusly:

> "Long prior to our independence there had grown up under original writs certain well-defined actions at common law, among them, the action of debt covering, among other causes, suits for statutory penalties and qui tam actions. See, Chitty on Pleading, Seventh American Edition, page 126. That such an action was recognized as a suit at common law in this country, in the year 1795, is made sparklingly clear in U.S. v. Mundell, 27 Fed. Cas. 23, No. 15-834.
>
> * * * * *
>
> It is my thought that when a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an ac for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights."[20]

Judge Fake's analysis in *Jepson* accords with this Court's decision in *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946), and suggests the proper result here. That case, like *Jepson* involved an action under the Emergency Price Control Act. That Act provided *inter alia*, for criminal sanctions, injunctive relief and the stated penalty for treble the amount of any overcharge in violation of the Act. This Court held that a court granting relief under the civil penalty sections of the Act "acts as court of law rather than as a court of equity . . ." Here, OSHA is similar to the Emergency Price Control Act in that in under separate provisions it calls for injunctive relief,[21] criminal sanctions,[22] and civil penalties.[23] The civil penalty provisions here are "legal" and command that the right to jury trial be afforded.

20. *United States* v. *Jepson*, *supra*, at 984, 986. *Accord*, *United States* v. *Hart*, 86 F. Supp. 787 (E. D. Va. 1949); *United States* v. *Friedland*, 94 F. Supp. 721 (D. Conn. 1950). See, *United States* v. *Williams*, 498 F. 2d 414, 422-423 (2nd Cir. 1974) and authorities cited therein.

21. OSHA § 13, 29 U. S. C. § 662.

The foregoing requires the conclusion that had Congress provided for the enforcement of OSHA in district court, the right to jury trial would attach.[24] Since Congress has chosen an administrative tribunal rather than district court in which the legal actions arising under OSHA should be tried, may Congress nullify the Constitutional right of trial by jury by this "mere statutory enactment"? *United States* v. *Jepson*, *supra*. As we demonstrate below, Congress may not permissibly do so.

C. Congress' Selection of an Administrative Forum Here Does Not Destroy the Right to Jury Trial.

Primarily in reliance in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), the Third Circuit below concluded that the right to jury trial did not attach because OSHA is an administrative proceeding. In *Jones & Laughlin*, the Court ordered enforcement of an NLRB order requiring reinstatement and back pay to a discharged employee. The respondent argued there that the back pay order was analogous to an award of money damages at common law, thus entitling it to a jury trial under the seventh amendment. The Court rejected this contention, holding that where an award of money damages is only incidental to the equitable relief of reinstatement, no seventh amendment right attaches.

This holding is not at odds with the seventh amendment because a Labor Board proceeding is equitable; it merely seeks restitution of the *status quo ante;* specifically, it places employees in the exact position in which they would have been had no violation of their statutory rights occurred. Similarly, in *Porter* v. *Warner Holding Co.*, *supra*, while that portion of the Emer-

22. OSHA § 17(e), 29 U. S. C. § 666(e).

23. OSHA §§ 17(a-d), *supra*.

24. *Curtis* v. *Loether*, *supra*; *United States* v. *Williams*, *supra*.

gency Price Control Act which permitted injunctive relief, including restitution of overcharges, was deemed to be an equitable action, it was deemed so only in that regard. Since the government may seek restitution as an incident to injunctive relief in court, Congress may establish an administrative agency to adjudicate such matters without running contrary to the requirements of seventh amendment. An OSHA monetary exaction, however, is not incidental to an abatement order in the way that back pay is incidental to reinstatement. It does not seek to restore the *status quo ante*. It is payable to the Government and not to an employee injured as a result of a violation. Indeed, penalties may be exacted whether or not any employee is injured. OSHA monetary exactions are simply civil penalties. Therefore, a proceeding to enforce them is legal in nature and requires that the right to a jury trial be afforded.

Nothing in *Curtis* v. *Loether, supra,* suggests a contrary result. In *Curtis,* this Court had no difficulty in holding under traditional seventh amendment analysis, that the right to a jury trial attaches to a court proceeding to recover damages under Title VIII of the Civil Rights Act of 1968.[25] In response to the petitioner's contention that no right to jury trial accrued under that Act, this Court stated that *Jones & Laughlin* involved an administrative proceeding "where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme." 415 U. S. at 194. However, contrary the lower court's notion here that *Jones & Laughlin* stands for the broad proposition that regardless of the nature of the proceeding, the right to a jury trial will be denied simply because it will interfere with a statutory scheme. *Jones,* as noted was limited to an "equitable" proceeding.[26] That the mode which

25. 42 U. S. C. § 3612.

26. Justice Hughes, in relying on the fact that the NLRB created a statutory proceeding for the adjudication of unfair labor practices signified that this basis was limited to "equitable" actions or actions which did not carry a common law right to a jury trial:

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Congress selects for adjudication of legal actions is irrelevant under traditional seventh amendment analysis was established by Justice Story's language in *Parsons* v. *Bedford,* 28 U. S. (3 Pet.) *supra* at 447, considered to be the origin of the traditional test:

> "By *common law,* [the amendment's framers] meant . . . not merely suits which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights." (emphasis the Court's.)

The key elements of Justice Story's test are (1) that the right to jury trial is not limited to *proceedings* which existed at common law, and (2) that the right applies to actions where legal remedies are sought, *"whatever might be the peculiar form which they may assume . . ."* Thus, it is apparent that under traditional analysis the right to a jury trial would attach where, as here, legal rights are involved irrespective of Congress' creation of an administrative agency to adjudicate those rights.[27]

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> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown at the common law. It is a statutory proceeding Reinstatement of the employee and payment for time lost are requirements imposd for violation of the statute and are remedies appropriate to its enforcement." 301 U. S. at 48-49.

In any event, the *amicus* contends that even if the right to jury trial were here balanced against any alleged interference with this statutory scheme, the balance must be struck in favor of according employers their seventh amendment right. See, Part II of this brief.

27. In this regard, the Court's *arguendo* assumption, in *Pernell* v. *Southall Realty, supra,* that Congress could have entrusted landlord-tenant disputes in the District of Columbia to an administrative agency without acting contrary to the seventh amendment does not

(Continued on next page)

As Judge Gibbons in his dissent below stated, that if unbeknownst to legal scholarship, the majority below correctly interpreted *Jones & Laughlin,* then that case wrought "the most profound change and enormous redistribution of power among the three branches of the federal government of any case in the Court's history." In agreement with Judge Gibbons, the *amicus* has always thought that the arbiter of the lines drawn by the Constitution was this Court, not Congress; that in defense of one's legal rights, one is entitled to the guarantee of a jury trial rather than be thrown to the vagaries of the bureaucratic process; and that unless, contrary to the founding fathers,[28] we are willing to permit the nullification of our cherished rights by mere statutory enactment, the lower court's interpretation of *Jones & Laughlin* must be rejected, and the right to a jury trial under OSHA must be afforded.

Further, the fact that Congress has been permitted by legislation to deny the right to jury trials in certain areas does not suggest that that right should be denied here. Thus, in those cases wherein the authority of Congress to establish an administrative proceeding or otherwise deny the right of jury trial has been upheld, Congress was acting under powers expressly enumerated and exclusively ceded by the Constitution to Congressional control.[29] The rationale for this traditional deference has been stated by Justice White:

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require a different result. This *dicta,* followed by a citation to *Curtis, supra,* only reiterates the proposition that Congress does not act in contradiction to the seventh amendment by entrusting appropriate matters to administrative proceedings. The Court did not hold that Congress could deny the right to a jury trial where that right is guaranteed by the seventh amendment. Presumably, had the Court intended to overrule its preceding cases to the contrary, it would unquestionably have said so instead of reaffirming them.

28. See, fn. 14 of this brief and accompanying text.

29. *E.g., Passavant* v. *United States,* 148 U. S. 214; *Oceanic Stream Navigation Co.* v. *Stranahan,* 214 U. S. 320; *Elting* v. *North German Lloyd,* 287 U. S. 324; *Lloyd Sabaudo* v. *Elting,* 287

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> "In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it is within the competency of Congress, *when legislating as to matters exclusively within its control,* to impose appropriate obligations . . . without the necessity of invoking the judicial power." *Oceanic Stream Navigation Co.* v. *Stranahan,* 214 U. S. at 339. (Emphasis added.)

Here, however, that rationale requires rejection of the Government's claim that Congress may deny a jury trial in civil penalty proceedings under OSHA. Though OSHA was enacted in the exercise of the powers delegated to Congress under the Commerce Clause and the general welfare provision of article I,[30] occupational safety is not expressly delegated to Congress by the Constitution, nor is it a domain over which Congress has exclusive control. It is one thing for Congress to establish proceedings which do not afford a jury trial when legislating as to matters which have been created and ceded by article I of the Constitution to Congress' exclusive care and control or as to matters which do not have a common law analog that afforded the right to jury trial. As to such matters, Congress' will is entitled to deference. However, as to matters where, by analogy, the common law accorded the right to a jury trial prior to enactment of the Constitution, the seventh amendment preserves that right and Congress' nullification of that right is not entitled to deference.

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U. S. 329; *Allman* v. *United States,* 131 U. S. 31; *Katchen* v. *Landy,* 382 U. S. 323, involved areas of taxation, alien immigration, import customs assessment, bankruptcy and the post office. All these areas are specifically enumerated and exclusively ceded to Congress by article I, section 8 of the Constitution. *Helvering* v. *Michell,* 303 U. S. 391 (1938) concerned only the right to jury a claim under Article III, Section 2 of the Constitution. The seventh amendment contention was not raised as it is here.

30. OSHA § 2(b), 29 U. S. C. § 651(b).

II.

APPLICATION OF A LESS TRADITIONAL "BALANCING" APPROACH MANDATES THE RIGHT TO A TRIAL DE NOVO UNDER OSHA.

It has been asked whether as a result of the expansive reading given *Jones & Laughlin* by the Court in *Curtis* v. *Loether*, the Court might now be applying a "balancing" test to determine the applicability of the seventh amendment rather than the traditional test discussed above.[31] However, the Court's opinion in *Curtis* clearly rejected any such notion of balancing asserted countervailing policy considerations against the constitutional guarantee stating: "[T]hese considerations are insufficient to overcome the clear command of the seventh amendment." 415 U. S. at 198. The *amicus* subscribes to this view and, in agreement with Judge Gibbons below, does not believe that speedy attainment of social goals, as desirable as they might be, can justify compromising the higher purpose of preserving constitutional government. Nevertheless, the *amicus* submits that even if the Court were to balance the considerations which would result in the denial of a jury trial in administrative proceedings against the seventh amendment guarantee, that balance results in the preservation of the right to a jury trial under OSHA.

Foremost among those policy considerations generally urged is the contention that a jury trial would substantially interfere with the statutory scheme.[32] Second is the argument that permitting jury trials would cause delay in enforcement due to the overburdening of court dockets. And, third is the view held among some observers that the issues to be dealt with under

31. See Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 N. W. L. Rev. 486, 520-521 (1975).

32. *Curtis* v. *Loether*, *supra*; *Block* v. *Hirsh*, 256 U. S. 135 (1971).

allegedly complex administrative rules and regulations are beyond the capabilities of juries.[33]

The first two objections do not withstand analysis here because providing for an elective trial *de novo* after the administrative procedure is completed would not substantially interfere with the administrative scheme of the Act. It would only impair the finality of administrative adjudications and leave the great majority of the Agency's functions unaffected. Nor would it seriously delay enforcement of OSHA. Since the Act already provides for district court enforcement of penalties levied under the administrative process, further consideration of the merits of the underlying citations would not seriously impede enforcement.[34] Any delay caused by permitting a jury trial is an insignificant consideration when weighed against the "policy" of preserving the seventh amendment guarantee. *Pernell* v. *Southall Realty*, *supra*.

Finally, there is no basis to the argument that juries are incapable of resolving issues arising from administrative regulations. If a jury of lay persons is fully competent to resolve complex questions arising under the antitrust laws, federal securities or trade regulations,[35] then surely it is not beyond the ken of the citizenry to determine whether an employer has created or permitted a hazardous condition to exist in the work place. As this Court has stated in response to those who criticize the jury system and would favor its erosion:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amend-

33. See, Redish, *supra* at 502-514.

34. In this regard, it has been noted that a procedure like that advocated here is employed under the Federal Communications Act, 47 U. S. C. § 503-504, and has not impeded enforcement of that Act. See L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 113 (Student ed. 1965).

35. *Beacon Theatres* v. *Westover*, 359 U. S. 500 (1959); *Ross* v. *Bernhard*, 396 U. S. 531 (1970); *United States* v. *Williams*, *supra*.

> ment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the Courts". *Jacobs* v. *New York*, 315 U. S. 752.

As stated, while the *amicus* rejects the "balancing" approach to the seventh amendment question because in the final analysis that test results in leaving in Congress power, by legislation, to nullify the right to jury trial,[36] application of that test here, nonetheless, compels that the right be accorded under OSHA.

CONCLUSION.

For the foregoing reasons as well as those urged by Petitioners, it is respectfully submitted that the judgments of the lower courts be reversed and that the OSHA enforcement procedures be declared to violate the seventh amendment.

Respectfully submitted,

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36. See, Redish, *supra* at 531.

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